

### **REMARKS**

Applicant respectfully requests reconsideration. Claims 1-20, 22, 27-32, 43, 45-57, 63-65, 70-73, 76-80, 83, 84, 88, 89, 94, 95, 97 and 98 were previously pending in this application. Claims 14, 15, 45-57, 63-65, 70-73, 76-80, 83, 84, 88, 89, 94, 95, 97 and 98 were withdrawn. By this amendment, Applicant is canceling claims 47-49, 54-56, 64-65, 83, 89, 94 and 98 without prejudice or disclaimer. Claim 12 has been amended to correct a typographical error. As a result, claims 1-13, 16-20, 22, 27-32 and 43 are currently under examination with claim 1 being an independent claim. Applicant asks the Examiner for clarification on the status of claim 22. In the Office Action mailed on November 13, 2008, claim 22 was not indicated as being rejected but neither was it indicated as being allowable.

Applicant respectfully requests rejoinder of the withdrawn process claims, containing the same limitations as the product claims currently under examination, should the product claims be deemed allowable. Applicant reserves the right to pursue the subject matter of the claims as previously pending, or as originally filed, in one or more continuing applications. No new matter has been added.

### **Rejection Under 35 U.S.C. § 101**

The Examiner rejected claims 1-13, 17-21, 28-33, and 44 (corresponding to claim numbers 1-13, 16-20, 27-32 and 44, as amended in the Office Action Response filed on August 8, 2008), under 35 U.S.C. § 101 based on the assertion that the claimed invention is directed to non-statutory subject matter. The Examiner contends that “nucleic acid molecules are naturally occurring, therefore the claimed immunostimulatory nucleic acid composition is deemed a product of nature.”

Applicant respectfully disagrees. According to MPEP § 2106 IV D, “The examiner bears the initial burden ... of presenting a *prima facie* case of unpatentability.” *In re Oetiker*, 977 F.2d 1443, 1445. The Examiner has not presented a *prima facie* case of unpatentability because the Examiner has not provided any evidence that a nucleic acid comprising the nucleotide sequence of SEQ ID NO:1 exists in nature. While nucleic acid molecules do exist in nature, no evidence has been presented to suggest that the particular claimed nucleic acid molecules exist in nature.

Accordingly, the claimed nucleic acid molecules are not a "product of nature" and thus are eligible for patent protection.

Accordingly, withdrawal of this rejection is respectfully requested.

### **CONCLUSION**

A Notice of Allowance is respectfully requested. The Examiner is requested to call the undersigned at the telephone number listed below if this communication does not place the case in condition for allowance.

If this response is not considered timely filed and if a request for an extension of time is otherwise absent, Applicant hereby requests any necessary extension of time. If there is a fee occasioned by this response, including an extension fee, the Director is hereby authorized to charge any deficiency or credit any overpayment in the fees filed, asserted to be filed or which should have been filed herewith to our Deposit Account No. 23/2825, under Docket No. C1037.70044US00.

Dated: February 12, 2009

Respectfully submitted,

By 

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